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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

E.O. et al., Petitioners, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Real Party in Interest.	E055147 (Super.Ct.No. INJ1100102) OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Lawrence P. Best, Judge. Petitions denied.

Modesto Rios for Petitioner E.O.

Denise E. Shaw for Petitioner D.H.

No appearance for Respondent.

Pamela J. Walls, County Counsel, and Prabhath D. Shettigar, Deputy County Counsel, for Real Party in Interest.

Petitioners E.O. (Father) and D.H. (Mother) seek review of an order denying reunification services with respect to their children B. and E.[1] When the parents took the children to the doctor for immunizations on February 19, 2011, the physician noted that E. had multiple bruises on his body at various stages of healing. X-rays revealed that E. had a skull fracture, a fractured forearm, a fractured humerus, two fractured tibias, and several fractured ribs. The fractures were at various stages of healing. Further testing revealed internal bleeding and a laceration on the liver.

Riverside County Department of Public Social Services (Department) was notified and responded. Mother stated at the time that there was a family history of anemia and easy bruising. She also reported a recent incident with E.'s arm, as she took him out of a swing. She had no explanation at the time for the other fractures. Both minors were detained the next day.

Mother told the social worker that she was living with her mother, three of her siblings, a family friend, and the friend's teenaged daughter. She described herself as a stay-at-home mother, and she denied that the children were ever left unsupervised. Father, who lived with his parents but visited with Mother and the children daily, also told the social worker that Mother "'is always good with the baby,'" and he appeared

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[1] Mother's oldest child, A., resides with his father and is not the subject of this petition. A.'s father obtained a custody order prior to the commencement of these proceedings.

"surprised and concerned" when told of E.'s injuries. Both parents described E. as a sickly, colicky infant. Mother privately expressed frustration in regard to what she reported as Father's minimal involvement in child care, especially commenting on his reluctance to care for E. Father described himself as somewhat more active but conceded that he did not feel comfortable with an infant, and that he did not like to bring E. to his home because E. often cried. He also said that his parents were always present when he had the children.

The attending physician told the social worker that "the explanation provided by the parents regarding the infant's bruising is inconsistent," and the injury to the forearm could not have happened as mother described "since the fracture presents as an 'impact fracture.'"

An investigation into Mother's home revealed that the Department had checked allegations that her siblings and the other teen residing there were "allowed" by the maternal grandmother to get drunk, smoke marijuana, and shoplift food. A referral received by the Department in 2009 indicated that there were three families living in the house; they often ran out of food near the end of the month; and that there was a lot of arguing and screaming coming from the house. The referral was disposed of as "unfounded." Mother herself had been a dependent child of the court and had spent three years in foster care.

Before the jurisdictional hearing, both Mother and Father were given referrals for parenting classes and counseling, and both participated. However, Mother's therapist

reported that she "laughed" when asked about E.'s injuries, saying they were due to rickets and anemia. She blamed the social worker for the loss of the children.

Testimony at the jurisdictional and dispositional hearings was extensive and may be summarized as follows. The parents' efforts focused on the theory that E.'s bruising and fractures were due to anemia and a vitamin D, calcium, or phosphorus abnormality.

The Department's medical witness, forensic pediatrician Dr. Massi, described the injuries and testified that some of the bruises were on "soft tissue" areas where bruises were unlikely to be accidental, compared with bruises over a bony prominence, which might be caused by a fall. (E., of course, was not yet self-mobile.) He believed that a bruise on E.'s face bore the pattern of a slap mark, and that several of the fractures were "usually seen in the context of child abuse." Dr. Massi also testified that E.'s vitamin D level was normal at the time he was admitted, and that although it was not possible to say whether the infant had been vitamin D deficient in the past, his bones appeared normal and not consistent with the effects of a deficiency.

On cross-examination, Dr. Massi agreed that Mother had tested low for vitamin D some six months before E.'s birth, and that a child born to a vitamin D deficient mother might be deficient as well. He further agreed that current practice is to provide supplemental vitamin D to all infants and that the vitamin plays a crucial role in bone development. However, he pointed out that even if there is the "epidemic" of vitamin D deficiency, which some medical reports describe, there has been no corresponding epidemic of bone fractures in children. Dr. Massi was also firm in the opinion that E.'s

bones looked "essentially normal," and that "he should not have been more prone to injury than another child."

Dr. Massi was also cross-examined extensively on the subject of the liver laceration. He attributed any anemia from which the child suffered after his hospital admission to bleeding from that laceration. He testified that the computerized tomography (CT) scan results were consistent with bleeding *inside* the liver although no blood was visible outside the liver capsule. Dr. Massi's final opinion was that the injuries were not accidental.

Petitioners began their case with the detective who had originally investigated the case. He testified that three days after the Department was called, Mother told the detective that one of her younger siblings (I.) told her that E. had been accidentally dropped on the floor or had hit his head on the tile floor while another one of Mother's siblings (S.), who was nine years old, was "bouncing the baby." I. confirmed this incident to the officer. This allegedly had occurred a few days before E. was taken to the doctor. I. also told the detective that on another occasion—I. appeared confused about the sequence—S. had jumped onto a bed and fallen on E.'s head and chest. S. confirmed the head incident but denied landing on E. on the bed. On cross-examination, the detective also testified that when he related these claims to Dr. Massi, the doctor indicated that all of the injuries could not be explained in this manner because the fractures were at different stages of healing, and that there were also spiral fractures caused by pulling or tugging.

The parents' next witness was Dr. Gabaeff. Like Dr. Massi, Dr. Gabaeff was qualified in clinical forensic medicine, and he was also familiar with vitamin D deficiency and its effects. The essence of Dr. Gabaeff's testimony was that the diagnoses applied to E. were substantially inaccurate. He believed that E. was "borderline anemic" when admitted to the hospital and that this condition led to "easy bruisability." He also considered the bruises to be at worst "minimal" as reflected in photographs. His review of medical records and testing also led him to believe that Mother was vitamin D deficient at birth and that E. almost certainly was as well. Dr. Gabaeff testified that E. probably had "weak bones" at birth and that the rib fractures could have been produced during the birth process—in fact, he described the rib abnormalities "virtually diagnostic of vitamin D deficiency and rickets." He also believed that idiopathic bony abnormalities in E.'s legs had been misdiagnosed as fractures. Dr. Gabaeff also testified that the information about the infant's fall on his head was consistent with the skull fracture. As for the arm fracture, Dr. Gabaeff accepted Mother's explanation.[2] He stressed repeatedly that all the findings were consistent with rickets and not inflicted injuries. He disagreed

[2] Dr. Gabaeff presented with apparent hostility to the Department, referring to its effort "to take control of the baby" by promulgating "misinformation," and also commented that the "very minimal" bruises "yet they were woven into an abuse narrative." He also stated at one point, "The baby was dropped on the floor, *we know that*." (Italics added.)

that the CT scan results showed any liver laceration. Finally, he gave the opinion that "this was not child abuse in any way, shape, or form."[3]

On cross-examination, Dr. Gabaeff was asked to comment on the fact that at least three doctors had made note of visible bruising on E.'s body; his response (to which an objection was in part sustained, for obvious reasons) was "I know that Loma Linda—bruising was a theme that developed and was prominent . . . ."

Dr. Gabaeff was impeached by the showing that a pediatric expert on whose text he had relied defined "severe" vitamin D deficiency at a point substantially lower than E. showed when hospitalized and also significantly lower than Dr. Gabaeff theorized would have been present at E.'s birth. The witness also conceded, with respect to the theory of anemia, that the infant's hemoglobin and hematocrit readings were all within normal levels within a day or so of his birth, and were normal when he was admitted to the hospital. Finally, counsel for the Department established that the figures on which Dr. Gabaeff's report relied to show that E. exhibited classic signs of rickets came from a study prepared by his colleagues, and was never published.

Neither Mother nor Father, nor any members of their families, testified. Accordingly, the juvenile court's only task was to determine which of the medical

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[3] Dr. Gabaeff was also gratuitously critical of the record keeping at Loma Linda University Medical Center. He described "strange statements" by E.'s pediatrician, supposedly given as explanation for not administering routine immunizations or treating E.'s repeated respiratory and/or sinus issues. Of course, this criticism depended upon an acceptance of Mother's explanation of why the minor had not been immunized and/or assuming that she accurately reported what she had been told by the pediatrician.

If anything, Dr. Gabaeff's report is even more abrasive and inflammatory in tone. He clearly believes that many reported child abuse cases are in fact "witch hunts."

witnesses to believe, and it unequivocally found Dr. Massi the more credible and reliable. It found Dr. Gabaeff evasive and hyperbolic as to his qualifications and experience, and felt that he gave "scripted answers." Accordingly, it found the children to be dependent persons under Welfare and Institutions Code section 300,[4] subdivisions (b) and (j), as to B., and subdivisions (a) and (e) as to E.[5] It denied reunification services to both Mother and Father under section 361.5, subdivision (b)(6).[6]

Both parents, in separate petitions, contend that the denial of services was erroneous. We will address their contentions and reject them.

DISCUSSION

The parents both argue that section 361.5, subdivision (b)(6), does not apply because there is no evidence that either of them *personally* inflicted harm on E.,[7] and the

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[4] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[5] Section 300, subdivision (a), is "serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian"; subdivision (b) is "risk" due to "failure . . . to . . . protect"; subdivision (e) covers "severe physical abuse by a parent" for a child under five years; and subdivision (j) applies where a child is at risk and a "sibling has been abused or neglected."

[6] That subdivision authorizes the denial of reunification services if the child has been adjudicated a dependent based on the infliction of severe sexual abuse or severe physical harm either to the child or a sibling, and the abuse or harm was inflicted either by a parent or guardian.

[7] Father relies on the language of the statute allowing denial of services based on severe physical harm "deliberate and serious injury inflicted . . . by an act or omission of the parent or guardian, or of another individual . . . with the consent of the parent."

juvenile court made no such express finding.[8] Both rely on *Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839.[9] In that case, the court denied services as to both parents under the authority of section 361.5, subdivision (b)(6), the majority held that "where there is no evidence to show that both parents knew the child was abused or injured, the court must identify the parent who inflicted the child's injuries before denying reunification services to that parent." (*Tyrone W.*, at p. 852.) Conversely, however, the court expressly commented that it did "not quarrel with the proposition that when the child's injury or injuries were obvious to the child's caretakers and they failed to act, the court is not required to identify which parent inflicted the abuse by act and which parent inflicted the abuse by omission or consent." (*Ibid.*)

In *Tyrone W.*, the medical examiner suspected the minor's sibling had died of sudden infant death syndrome; however, several healing rib fractures were discovered during the autopsy. (*Tyrone W.*, *supra*, 151 Cal.App.4th at p. 844.) In holding that services could not be denied to a parent who was not aware of the abuse, the court noted

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[8] The Department asserts that both parties waived this argument, at least as presented at some angles, because they did not make the legal arguments in the juvenile court. As the questions raised are largely those of law, we exercise our discretion to consider them even if the waiver objection is correct. (See, e.g., *Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1709.)

[9] The father in *Tyrone W.* relied upon *In re Kenneth M.* (2004) 123 Cal.App.4th 16, as does Father here. (*Tyrone W.*, *supra*, 151 Cal.App.4th at p. 848.) In what was arguably dicta, the court in *Kenneth M.* agreed that "[b]y its express terms, subdivision (b)(6) applies to the parent who inflicted severe physical harm to the minor." (*Kenneth M.*, at p. 21.) As the court in *Tyrone W.* recognized, *Kenneth M.* did not address the issue of when a parent may be held to have inflicted severe physical injury by *omission*. (see *Tyrone W.*, at p. 849.)

that the dead child's "injuries, although severe, were not obvious. There was no bruising or other marks on [the dead child] and no reports that [that child] had been in distress." (*Id.* at p. 852.)

In this case, by contrast, there was evidence from Dr. Gabaeff that fractures such as those suffered by the minor, if accurately described by Dr. Massi, would have caused considerable pain. There was also testimony that Father complained that E. cried a lot, raising an inference of discomfort, while Mother indicated that he was colicky. Multiple doctors and other professionals recorded evidence of bruising on E.'s body. If credited, as the juvenile court evidently did, this was substantial evidence that E. *did* show clear signs of abuse and that one parent inflicted the harm and the other parent was, at best, willfully indifferent to the evidence of abuse.[10] With respect to Mother, the juvenile court could also have considered her persistent, and cavalier, attribution of the child's bruising to anemia apparently without having considered it significant enough to follow up.

We also note that section 361.5, subdivision (b)(5), allows a court to deny services to a parent if the minor has been made a dependent of the court under section 300, subdivision (e), because of the conduct of that parent. E. *was* made a dependent under

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[10] Admittedly, this evidence is not as strong as that contained in *Pablo S. v. Superior Court* (2002) 98 Cal.App.4th 292 at page 295, in which there was evidence that after suffering a broken leg, the minor hopped around on one leg for about three weeks, complaining of pain, while the parents delayed seeking medical treatment. The grandmother also testified that the child's leg was swollen and becoming deformed. However, the evidence in this case was sufficient to support the finding that the parents were aware the minor had injuries.

subdivision (e), which applies to severe abuse suffered by minors under the age of five years. Denial of services under subdivision (b)(5) does *not* require a finding of direct fault and may be based on negligence. (*Kenneth M.*, *supra*, 123 Cal.App.4th at p. 21.) Subdivision (b)(7) allows denial of services with respect to the *sibling* of a child found to be a dependent under section 300, subdivision (e), and denial under this section does not require anything more than negligence either. (*Kenneth M.*, at p. 22.) Thus, precisely as in *Kenneth M.*, the juvenile court *could* have denied services under these subdivisions as to both children even if subdivision (b)(6) did not apply.

DISPOSITION

Accordingly, the juvenile court correctly denied services as to both children. The petitions are denied.

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HOLLENHORST
Acting P.J.

We concur:

KING
J.

CODRINGTON
J.